MOHAMED OTHMAN & ANOR.

v.

ABDUL SHATTAR ABDUL RAHIM & ORS.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
SYED AGIL BARAKBAH SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 343 OF 1985]
13 DECEMBER 1986

CONTRACT: *Application in High Court for specific performance - Rules of the High Court 1980 - Order 81 - Order for sale of all of the defendants' shares to plaintiffs - Plaintiffs' contention that the offer made by the company's secretary was valid and binding on the defendants - Letter from secretary - Whether it contained an offer - Application dismissed - Appeal - Secretary - Whether acting on behalf of the company - Letter of offer - Whether a contract was formed - Any triable issues.*

This was an appeal by the plaintiffs/appellants when their application under O. 81 of the Rules of the High Court 1980 for specific performance of a contract for sale of shares of the defendants/respondents to the appellants was dismissed by the High Court trial Judge. The appellants contended that by letters dated 30 October 1981 they had received valid offers from the company's secretary for sale at RM17 per share and they accepted the offers. The respondents disputed the appellants' claim and contended that they merely informed the secretary of the price at RM17 per share as the price which was being bid and they invited the shareholders to offer their highest bid and the letters amounted to no more than an invitation to treat. The respondents also contended that the said secretary had no authority to issue the letters offering the shares at RM17 per share. The trial Judge held that the secretary had no authority to write the letters of offer and the letter dated 28 October 1981 constituted a transfer notice under Article 34(b).

Held:

[1] The secretary in the instant case was acting on the orders of the company with full authority based on the resolution of the meeting of the board of directors on 20 October 1981 in which the 1st respondent himself was the chairman. The secretary was acting on behalf of the company and what he did was to convey the decision of the board. The letter of offer was accepted by the appellants to buy the said shares. Thus, a contract was formed.

[2] There were no other triable issues and their Lordships were satisfied that the evidence before the learned Judge was sufficient for him to come to a decision. In the result, their Lordships set aside the order of the trial Judge dismissing the application and made an order of specific performance in terms of the application.

[Appeal allowed with costs here and the Court below.]

Legislation referred to:
Companies Act 1965, s. 139
Rules of the High Court 1980, O. 81
Rules of the Supreme Court 1980, r. 52(3)

Other sources referred to:
Company Law, Pennington, (1979), 4th Edn.
Tophan & Ivany's, Company Law, (1974), 15th Edn.
Gore Brown on Companies, 43rd Edn., para. 26-9

For the appellants - R.D. Rajasingam; M/s. Lewis & Co.
For the respondents - Y.M. Raja Aziz Addruse (P.S. Gill with him); M/s. Gill & Tang

JUDGMENT

Syed Agil Barakbah SCJ:

This was an appeal against the decision of the learned Judge of the High Court, Kuala Lumpur; dismissing the appellants'/ plaintiffs' application under O. 81 of the Rules of the High Court for specific performance of a contract for the sale of shares of a company known as Forex Enterprise Sdn. Bhd., incorporated in the states of Malaya and having its registered office at 2nd floor, Ming Building, Jalan Bukit Nanas, Kuala Lumpur ("the company"). Earlier the learned Judge heard the application in chambers and allowed it but subsequently after hearing in open Court, he dismissed it with costs.

The respondents also filed a cross-appeal but a preliminary objection was raised on the ground that it was served on the appellants out of time. The objection was dismissed since in our view there were reasonable grounds for exercising our discretion to grant them leave under r. 52(3) Supreme Court Rules 1980. The cross-appeal was allowed to stand.

Briefly the uncontroverted facts were that the appellants and the respondents were shareholders of the company. The former owned 32% of the shares and the latter had a total of 51% of the shares. The respondents authorised the first respondent to negotiate the sale of all their shares in the company to the highest bidder. The first respondent in turn authorised the secretary of the company to make offers to the existing shareholders to purchase all the said shares. The secretary accordingly sent out letters of offer. The appellants received a letter dated 30 October 1981 from the secretary to the effect that the respondents had decided to sell their 51% shares at RM17 per share. The appellants accepted the offer to purchase all the said shares by letters dated 18 and 19 November 1981 sent to the secretary who in turn communicated it to the respondents. The latter subsequently refused to effect the sale of their 51% shares. After protracted negotiations the appellants filed a writ claiming against the respondents for specific performance of the agreements reached between the parties, for damages of breach of contract in addition or in lieu of the above, injunction, further and other reliefs and costs. The respondents had filed their statement of defence.

Before us, there were three issues to be considered, *viz:*

(1) Whether there was a valid and enforceable contract between the parties for the purchase of the respondents' 51% shares.

(2) Whether there was notice of transfer of the shares as required under Article 34 of the company's articles of association, and

(3) Whether the secretary was acting on his own or in the name of the company in offering the said shares for sale.

All the three issues are inter-related and the answer to the first depended on the answers to the other two issues.

The learned Judge in dealing with the second issue held that the letter dated 28 October 1981 written by the first respondent to the secretary of the company was a transfer notice as required by Article 34(b) of the company's articles of association and with that notice the company became his agent for the sale of the shares. With respect, we agree with the learned Judge.

Article 34 is a restrictive clause which is intended to prevent shares of the company from going outside the hands of existing members. It allows a member to transfer his shares to another member but disallows any such transfer to a non-member unless it is first offered to all the other members. Under para. (b) which is material to the present appeal, the proposing transferor is required to give notice in writing to the company of his intention to transfer. The transfer notice is required to specify the sum he fixes as the fair value of his shares and shall constitute the company his agent for the sale of the shares to any member of the company willing to purchase them at the price fixed. A transfer notice may include several shares and shall not be revocable except with the sanction of the board. Under para. (c), the company is required within fifty-six days after being served with the transfer notice to find a purchasing member. The company shall give notice to the proposing transferor who shall be bound to transfer the shares to the purchasing member, upon payment of the fair value as fixed in para. (b) and (d). It is clear therefore that the letter of 28 October 1981 sent out by the first respondent for and on behalf of all the four respondents was a notice of transfer as required under Article 34 which came into play thereby making the company to be their agent. The letter states:

ABDUL SHATTAR BIN ABDUL RAHIM

28 October 1981

The Secretary,
Forex Enterprise Sdn. Berhad,
Bangunan Ming,
Jalan Bukit Nanas,
KUALA LUMPUR.

Dear Sir,

Forex Enterprise Sdn. Bhd.

In connection with the sales of 51% of shares in the above stated company, the offer I have received so far is RM17 (Ringgit Seventeen only) per RM1 (Ringgit One only).

Please inform the remaining shareholders of this offer.

Thank you.

Yours sincerely,

Sgd.

On the third issue, the learned Judge held that the secretary had no power to act for the company in respect of the sale of the respondents' shares on the ground *inter alia* that he had no authority to write the two letters of offer dated 30 October 1981 to the two appellants and the letter dated 21 November 1981 to the first respondent and in doing so he was acting *ultra vires* the articles of association. With respect, we do not agree because the learned Judge erred in arriving at such conclusion. He merely referred to Article 116 of the articles of association which gives the board powers to delegate its powers to committees consisting only of the members of the board. His attention was not drawn to the provisions of Article

94 which provides *inter alia* powers to the board to appoint persons to be members of the committee, or managers or agents and to delegate to any such persons any of the powers, authorities and discretions vested in the Board with power to subdelegate. The board is also empowered to appoint a secretary under Article 122.

Section 139 of the Companies Act 1965 contains provision for the appointment of one or more secretaries in a company incorporated pursuant to the Act. The secretary of a company is its administrative officer and his function is to give effect to the decisions of the board of directors by drafting and signing contracts and other administrative matters. He has no power to make commercial decisions on the company's behalf and he acts outside his authority if he borrows money in the company's name or negotiates contracts on its behalf. He may however negotiate contracts necessary for carrying on the administration of the company's organisation, such as contracts for appointment of staffs etc. Of course, the articles of association may empower the directors to delegate any of their powers to any agent they choose and it is not uncommon for them to delegate to the secretary especially when the secretary is also a director. (Pennington *Company Law*, 4th Edn., Butterworth (1979)). The secretary can also act as agent for the company to do such things as are delegated to him, or are normally performed by the secretary. (*Topham & Ivany's Company Law*, 15th Edn., Butterworth & Co. (1974)). He must obey the orders of the directors and give effect to their resolutions by issuing notices, sending circulars, writing letters etc. He will also prepare the agenda for director's meetings and general meetings of the company and normally writes up the minutes, either from his own notes or from those of the chairman. (Gore Brown On *Companies*, 43rd Edn., para 26-9).

On perusal of the relevant records, we are satisfied that the secretary in the instant case was acting on the orders of the company with full authority based on the resolution of the meeting of the board of directors on 20 October 1981 in which the first respondent himself was the chairman. (see pp. 193/194, 2nd vol. of the appeal record). The chairman briefed the meeting that he had been given a mandate by three of the shareholders to sell their shares for more than RM10 per share. He had scouted around and succeeded in finding an interested party to purchase the shares at RM17 each. He then asked the secretary to give an opinion of how to go about Article 34 of the articles of association. After hearing the secretary's view,the chairman agreed to hand over within the next two days the relevant letters pertaining to the offer and the authority from the other shareholders including a covering letter from the first respondent for sale of his own shares and indicating clearly the amount of RM17 as the selling price per share covering the sale of the whole of 51,000 shares. The meeting also authorised the secretary to circulate to the other members as soon as practicable the offer for sale of the said shares within the following terms of reference:

(a) The period for accepting the offer being 30 days from the date of the letter; and

(b) suitable arrangements to be made immediately thereafter for settlement etc. in the event of acceptance.

In furtherance to the authority given, the offer for sale was sent out to the share holders including the appellants by the secretary in his capacity as the secretary of the company and not on his own behalf. (see pp. 189/190, 2nd Vol. of the appeal record). In other words, he was acting on behalf of the company and what he did was to convey the decision of the board. The letter of offer was accepted by the appellants to buy the said shares. In our view, a contract was formed. The answer to the first question is therefore in the positive.

We do not think there are other triable issues and are satisfied that the evidence before the learned Judge are sufficient for him to come to a decision. We therefore allowed the appeal with costs here and in the Court below. We set aside the order of the trial Judge dismissing the application and made an order of specific performance in terms of the application. The deposit should be returned to the appellant. We also dismissed the cross-appeal with costs.

Subsequently on 10 November 1986 we heard further submissions from Counsel on the question of interest payable on the purchase price and the profits earned by the company for period commencing from 19 September 1981 (the date on which the contract ought to have been performed but not performed) to the date of the actual performance. In view of the fact that it was the respondents who refused performance of the contract these two questions must be decided on the basis of fault.

In our view, since it was the fault of the respondents, the appellants are not bound to pay interest and for the same reason the appellants are entitled to the profits earned by the company.

Wan Hamzah SCJ:

Both plaintiff and all of the defendants are, and were at the material times, shareholders in Forex Enterprise Sdn. Bhd. (herein referred to as the company). The plaintiffs brought an action in the High Court in which the main prayer is for an order against all the defendants for specific performance of alleged agreements for the sale of all of the defendants' shares in the company to the plaintiffs. In their statement of claim the plaintiffs allege that by a written authorisation dated 1 September 1981 the first, second, third and fourth defendants authorised the first defendant to negotiate for the sale of all their shares in the company to the highest bidder, and that the first defendant authorised one Folk Fong Shing (who was then the secretary of the company) to make offers of sale of all the shares of the defendants to the other shareholders of the company, and that the plaintiffs by letters dated 30 October 1981 received such offers from the secretary, for sale at RM17 per share, and accepted the offers. The defendants dispute the plaintiffs' claim, and in their statement of defence they raise *inter alia* the following issues and contend that-

(a) the defendants through the first defendant merely informed the secretary of the price of RM17 per share as the price which was being bid, but did not offer RM17 per share as the price for the proposed sale;

(b) in terms of the letters dated 1 September 1981 and 28 October 1981 the defendants invited the shareholders to offer their highest bid and the said letters amount to no more than an invitation to treat;

(c) Folk Fong Shing had no authority and was not authorised to issue the alleged letters dated 30 October 1981 offering RM17 per share;

(d) Folk Fong Shing failed to extend to the first defendant copies of the alleged letters dated 30 October 1981 until after 23 November 1981.

The plaintiffs filed summons-in-chambers under O. 81 of the Rules of the High Court asking for the grant of the order of specific performance on the ground that the defendants have no defence to the action. A number of affidavits were filed in support of the application including one deposed to by Folk Fong Shing. A number of affidavits were used by the defendants to oppose the application. In the affidavits more issues are raised, among which are the following:

(i) The plaintiffs contend that the first defendant's offer to sell at RM17 per share was recorded in the minutes of the board of directors meeting on 20 October 1981 attended by the first defendant as the chairman and by the second defendant as a director. The defendants contend that the minutes were draft minutes wrongly recorded and not confirmed at subsequent meetings of the board.

(ii) The defendants contend that on or about 28 October 1981 the first defendant merely forwarded to Folk Fong Shing a copy of the defendants' letter of 1 September 1981 authorising the first defendant to negotiate, together with the first defendant's letter dated 28 October 1981 requesting Folk Fong Shing to inform the other shareholders that thus far he had received offers of up to RM17 per share.

(iii) The defendants contend that on 23 November 1981 the first defendant rang up Folk Fong Shing in the morning and informed him that he had received a bid of RM27 per share and requested him to inform the shareholders, and Folk Fong Shing replied that it was too late for him to do so as he had sent out the letters of offer of RM17 per share, but he never mentioned that the alleged offers had been accepted. The first defendant immediately told him that he (Folk Fong Shing) had no authority to make offers of sale of the defendants' shares but he was merely required to call for bids.

(iv) The defendants allege that immediately after the telephone conversation on 23 November 1981 first defendant wrote a further letter dated 23 November 1981 Folk Fong Shing stating that he had just received an offer to purchase at RM27 per share, and he personally delivered the letter to Folk Fong Shing and again confronted him as to why he had made the offer and why no copies of his alleged offer letters had been sent to the first defendant. Folk Fong Shing still did not mention that the alleged offers had been accepted.

(v) The defendants contend that it was after first defendant had sent his letter dated 23 November 1981 that he received Folk Fong Shing's letter dated 21 November 1981 informing of the acceptance of the offers sent out by him.

(vi) The defendants contend that no transfer notice had been given as required under Article 34(b) of the memorandum and articles of association.

(vii) The defendants contend that the alleged acceptance by the plaintiffs of the alleged offers is not binding on the defendants as it was done in collusion with Folk Fong Shing against whom the defendants had issued a third party notice by which the defendants claim against him to be indemnified against the plaintiffs' claim and for damages for wrongful misrepresentation or breach of professional duty or for professional negligence in issuing letters of sale without authority and without transfer notice by the defendants.

After hearing further arguments in open Court the learned Judge dismissed the plaintiffs' summons. In his judgment he considered only two of the issues listed above, i.e., issues (c) and (vi). On issue (vi) he made a finding that the letter dated 28 October 1981 constitutes a transfer notice under Article 34(b). On issue (c) he held that Folk Fong Shing had no authority to write the letters of offer dated 30 October 1981 to the plaintiffs. He so held for the reasons which he stated in the judgement. It appears that because he decided to dismiss the summons on issue (c) he felt that it was not necessary for him to consider and decide on the other issues. In my opinion all issues in this case have to be tried before it can finally be determined whether the plaintiffs are entitled to order of specific performance. In my judgment many of the issues cannot be disposed of fairly merely on affidavit evidence. In order that justice be

done the parties should be given chance to call witnesses if they wish and to examine or cross-examine the deponents of the affidavits and the writers of the various documents produced.

I note that a few points in favour of the defendants' case emerge from some of the documents produced to the Court. In his letter dated 28 October 1981 sent to Folk Fong Shing the first defendant merely stated that the offer which he had received so far was RM17, and he did not state that he was making an offer of RM17 per share. When Folk Fong Shing's accountant firm wrote the letter dated 21 November 1981 to the First defendant, it referred to "your letter of offer dated 28 October 1981" and did not refer to offer allegedly made at the meeting of the board of directors. To treat the first defendant's letter of 28 October 1981 as a letter of offer seems to be incorrect as that letter does not contain an offer. There was a possibility that there was no offer made at the board of directors meeting and that Folk Fong Shing made the offers to the plaintiffs on the mistaken belief that the first defendant;s letter of 28 October 1981 was a letter of offer. However, all these are not conclusive and as I have already indicated the issues should be tried and the parties should be given chance to prove their case at the trial.

In my judgment the appeal should be dismissed and the defendants should have unconditional leave to defend.

Also found at [1987] 1 CLJ 535